No. SC92553

In The
Supreme Court of Missouri

CHARLES R. GARRIS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Warren County Circuit Court
Twelfth Judicial Circuit
The Honorable Keith Sutherland, Circuit Judge

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

JURISDICTIONAL STATEMENT

This appeal is from a Judgment entered April 24, 2012 denying Appellant's motion pursuant to Missouri Supreme Court Rule 24.035 ("Rule 24.035").[1] (L.F. 17). Since Appellant's claims challenge neither "the subject-matter jurisdiction of the trial court or the sufficiency of the information or indictment[,]" Appellant did not file a direct appeal. State v. Goodues, 227 S.W.3d 324, 326 (Mo. App. E.D. 2009).

"The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state . . . ." Mo. Const. art. V, sec. 3. "Whether an appeal falls within that general jurisdiction, or the exclusive appellate jurisdiction established for this Court by the constitution, id., is determined by the issues

[1] Appellant was delivered to the department of corrections on April 26, 2011. (L.F. 13). Since appellant did not appeal the judgment or sentence, "the motion shall be filed within 180 days of the date the person is delivered to the custody of the department of corrections." Rule 24.035(b). Appellant timely filed his motion pursuant to Rule 24.035 on October 20, 2011. (L.F. 7). The trial court entered a Judgment denying Appellant's Rule 24.035 motion on April 24, 2012. (L.F. 17). "No such appeal shall be effective unless the notice of appeal shall be filed not later than 10 days after the judgment or order appealed from becomes final." Missouri Supreme Court Rule 81.04(a). Appellant timely filed his notice of appeal on April 27, 2012. (L.F. 27).

raised and preserved in the trial record." State v. Smith, 779 S.W.2d 241, 242 (Mo. banc 1989).

"Constitutional violations are waived if not raised at the earliest possible opportunity." State ex rel. York v. Daugherty, 969 S.W.2d 223, 224 (Mo. banc 1998). Failing to challenge the constitutional validity of a statute before pleading guilty is fatal to a Rule 24.035 motion. Ross v. State, 335 S.W.3d 479, 479 (Mo. banc 2011); see also Feldhaus v. State, 311 S.W.3d 802, 805 (Mo. banc 2010) (holding that because the constitutional issue "was not raised at the earliest opportunity and prior to his plea of guilty, it was waived."). Since Appellant was eventually charged as a predatory sex offender, "[t]he earliest opportunity for the appellant to have raised his constitutional challenge to § 558.018 would have been during the predatory sexual offender status hearing." State v. Rogers, 95 S.W.3d 181, 185 (Mo. App. W.D. 2003); (L.F. 57; 78-79).

On April 22, 2011, Appellant (then Defendant) plead guilty to three counts of statutory sodomy in the first degree under section 566.062, RSMo 1994 ("section 556.062").[2] (L.F. 44; 81). However, and before pleading guilty, the State charged Appellant as a predatory sexual offender under section 558.018.5(2), RSMo Cum. Supp. 1996 ("section 558.018.5(2)"). (L.F. 57; 78-79). On April 11, 2011, a predatory sexual offender status hearing ("status hearing") was held. (L.F. 24). Appellant presented his motion challenging the constitutionality of section 558.018.5(2) under the Sixth

[2] All statutory citations to section 566.062 are to RSMo 2004; and all statutory citations to sections 558.018 and 558.021 are to RSMo Cum. Supp. 1996.

Amendment's jury trial guarantee to the trial court on April 11, 2011 and before the status hearing. (L.F. 24; 65). The trial court took the motion under advisement. (L.F. 77). Appellant presented his motion claiming a procedural due process violation under section 558.021.2, RSMo Cum. Supp. 1996 ("section 558.021.2") to the trial court on April 11, 2011 and before the status hearing. (L.F. 24; 63). The trial court denied Appellant's motion claiming a procedural due process violation on April 11, 2011 and before the status hearing. (L.F. 24; 76). On April 22, 2011, the trial court denied Appellant's constitutional challenge to section 558.018.5(2) and denied it before Appellant plead guilty on April 22, 2011. (L.F. 24-25; 80).

On April 22, 2011, having been previously found to be a predatory sexual offender by the trial court, Appellant was sentenced to the "extended term of imprisonment" of "life with eligibility for parole." Sections 558.018.4 and 558.018.6; (L.F. 81). The trial court sentenced Appellant to concurrent terms of life imprisonment with his minimum time required to be served before being eligible for parole set at fifteen years. Section 558.018.7; (L.F. 81-82).

Two questions of law are presented for review.

The first question is whether, in light of Apprendi and its progeny,[3] Appellant's Sixth Amendment right to a jury trial was violated when the trial court denied Appellant's motion challenging the constitutionality of section 558.018.5(2) under the

[3] Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v. Arizona, 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004).

Sixth Amendment's jury trial guarantee and hence this question involves the constitutional validity of a statute of this state. The Sixth Amendment's jury trial guarantee has been incorporated against the states. Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in a federal court -- would come within the Sixth Amendment's guarantee."); and Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) (explaining Duncan v. Louisiana's holding and stating that "[t]he right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'").

The second question is whether a status hearing under section 558.021.2 violates Appellant's Fourteenth Amendment right to due process – specifically procedural due process – when it is held before the jury trial date and the State is not proving past convictions but presenting evidence that appellant "previously committed an act which would constitute an offense listed in subsection 4 of this section, whether or not the act resulted in a conviction." Section 558.018.5(2). "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV. Thus, this question also involves the validity of a statute of this state.

Case law: the merits of a claim alleging that the predatory sexual offender statute identified by 558.018.5(2) violates the Sixth Amendment's jury trial guarantee in light of Apprendi and its progeny have yet to be reached.

The Court reviewed, on appeal after a jury trial, a due process and equal protection challenge to the predatory sexual offender statute. State v. Gilyard, 979 S.W.2d 138, 143

(Mo. banc 1998) (holding that defendant's rights to due process and equal protection were not violated). The Court discussed the claims in the context of a jury trial, but the opinion is silent as to whether a Sixth Amendment jury trial claim was actually presented to the trial court. And said case was decided before Apprendi v. New Jersey, 530 U.S. 466 (2000).

Another defendant attempted to bring a due process claim after a jury trial. State v. Rogers, 95 S.W.3d 181 (Mo. App. W.D. 2003). However, that defendant "failed to raise the constitutional claim at the predatory sexual offender hearing [and] also failed to raise it in his motion for new trial." Id. at 185. That court also declined to review the claim under the plain error standard of review. Id. at 186. The opinion made no mention of Apprendi.

Another defendant attempted to challenge the statute after pleading guilty in a Rule 24.035 post-conviction motion specifically claiming ineffective assistance of counsel ("IAC"). Johnson v. State, 103 S.W.3d 182, 187 (Mo. App. W.D. 2003) (indicating that the date of the guilty plea is controlling regarding IAC claims and Apprendi had not been decided when defendant plead guilty). The merits of whether section 558.018.5(2) was unconstitutional in light of Apprendi were not addressed because of how the issue was framed in the post-conviction motion. Id. at 188.

In brief, "the issues raised and preserved in the trial record" involve the constitutional validity of two statutes of this state. State v. Smith, 779 S.W.2d 241, 242 (Mo. banc1989). Therefore, exclusive jurisdiction for this appeal lies with the Missouri Supreme Court. Mo. Const. art. V, sec. 3.

STATEMENT OF FACTS[4]

On August 6, 2010, the State filed a felony Complaint against the Appellant in Warren County. (L.F. 46). Appellant had no prior convictions. (L.F. 65). The Complaint charged three counts: one count of sodomy and two counts of statutory sodomy in the first degree. (L.F. 46). Count I alleged that between May 18, 1988 and October 15, 1988 Appellant knowingly had deviate sexual intercourse with S.D. (DOB: 10-16-74). (L.F. 46).

On October 14, 2010, Appellant filed a Motion to Dismiss Count I claiming that Count I was not properly filed based on the applicable statute of limitations, i.e., section 556.037, RSMo Supp. 1987. (L.F. 49). On November 29, 2010, the State filed an Amended Complaint. (L.F. 53). The Amended Complaint did not contain Count I of the initial Complaint – S.D. with DOB 10-16-74 was no longer an alleged victim. (L.F. 46; 53).

On November 30, 2010, the State filed an Information. (L.F. 55). The Information charged three counts of statutory sodomy in the first degree and S.D. with DOB 10-16-74 was not the alleged victim in any of the counts. (L.F. 55). On December 7, 2010, the State filed an Amended Information. (L.F. 57). The Amended Information alleged that Appellant was a predatory sexual offender under section 558.018. (L.F. 57). The basis that Appellant was a predatory sexual offender was that appellant allegedly

[4] References to Appellant in this portion of the brief refer to when Appellant was the Defendant in the trial court.

committed the crime of statutory sodomy in the first degree, between May 18, 1988 and October 15, 1988, by having deviate sexual intercourse with S.D. (DOB: 10-16-74), who was less than fourteen years old. (L.F. 57). Prior to Appellant's Motion to Dismiss Count I, this conduct was the alleged basis for Count I of the Complaint. (L.F. 24; 46).

On February 25, 2011, the case was set for a jury trial on April 26, 2011. (L.F. 42-43).

On March 29, 2011, the State noticed up a status hearing for April 11, 2011 to prove Appellant was a predatory sexual offender. (L.F. 59). On April 4, 2011, Appellant filed a motion objecting to the State's request to hold a status hearing prior to there being any finding of guilt. (L.F. 60). On April 5, 2011, the trial court denied the motion. (L.F. 62).

On April 8, 2011, Appellant filed a motion claiming a procedural due process violation under section 558.021.2 if the status hearing was held on April 11, 2011 before the case was in a jury trial. (L.F. 63). On April 11, 2011, and before the predatory sexual offender status hearing began, Appellant filed and presented to the trial court two motions: one was a motion challenging the constitutional validity of section 558.018.5(2) under the Sixth Amendment's jury trial guarantee and the other motion sought to dismiss Count II's allegation of predatory sexual offender. (L.F. 24; 65; 72).

On April 11, 2011, the State filed a Second Amended Information. (L.F. 74). The date listed in the predatory sexual offender portion was changed from between May 18, 1988 and October 15, 1988 to between October 16, 1986 and October 15, 1988. (L.F. 57; 74).

On April 11, 2011, the trial court denied Appellant's motion claiming a procedural due process violation under section 558.021.2 and did so before the status hearing began. (L.F. 24; 76). The trial court took under advisement Appellant's constitutional challenge to section 558.018.5(2) and Appellant's Motion to Dismiss Count II's allegation of predatory sexual offender. (L.F. 77). The status hearing was held and S.D. with DOB 10-16-74 testified at said hearing. (L.F. 24; 43). And S.D. with DOB 10-16-74 is the same individual that is listed in Count I of the Complaint filed August 6, 2010. (L.F. 24). Appellant was found to be a predatory sexual offender based on the testimony provided at the status hearing. (L.F. 81-82). The trial court made this finding on April 11, 2012. (L.F. 17).

On April 22, 2011, the State filed a Third Amended Information and Count II no longer alleged that Appellant is a predatory sexual offender. (L.F. 78). Also on April 22, 2011, the trial court denied Appellant's motion challenging the constitutional validity of section 558.018.5(2). (L.F. 80). After this ruling Appellant withdrew his previously entered pleas of not guilty and a plea hearing was held. (L.F. 24-25; 81). The trial court accepted Appellant's pleas of guilty to three counts of statutory sodomy in the first degree. (L.F. 44; 81). Because of the trial court's finding on April 11, 2011 that Appellant was a predatory sexual offender and by operation of law, the trial court sentenced Appellant to concurrent terms of life imprisonment and set the minimum time required to be served before being eligible for parole at fifteen years. (L.F. 81-82).

POINTS RELIED ON

(Appellant's Rule 24.035 motion presented two claims to the motion court and said two claims were previously presented to the motion court acting as the trial court.)

POINT I

The motion court erred in denying Appellant's claim that his constitutional rights to a jury trial under the Sixth Amendment of the United States Constitution and Article I, Section 18(a) of the Missouri Constitution were violated when the trial court, before accepting his guilty pleas, denied his motion which challenged the constitutionality of the predatory sexual offender statute when the State is not proving prior convictions but proceeding under section 558.018.5(2). [5]

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). "[T]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." [6] Blakely v. Washington, 542 U.S. 296, 303 (2004).

Based on the two facts that 1) the trial court found Appellant (then defendant) to be a predatory sexual offender under section 558.018.5(2) on April 11, 2011 and 2) Appellant subsequently plead guilty to three counts of statutory sodomy in the first

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[5] See Rule 84.04(d)(1)(A).

[6] See Rule 84.04(d)(1)(B).

degree on April 22, 2011, the trial court was statutorily required under subsections six and seven of section 558.018 to sentence Appellant to the extended term of life imprisonment with eligibility for parole and to set the minimum time required to be served before being eligible for parole *even though* the trial court, solely on the basis of Appellant's guilty plea, could only impose a suspended imposition of sentence, a suspended execution of sentence, or a prison sentence and, should the trial court have chosen a prison sentence, the trial court could not also set the minimum time required to be served before being eligible parole, and therefore, Appellant's Sixth Amendment rights to a jury trial were violated because the finding under section 558.018.5(2) should be made by a jury in order to preserve "the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense."[7] Oregon v. Ice, 555 U.S. 160, 168 (2009).

Apprendi v. New Jersey, 530 U. S. 466 (2000).

Ring v. Arizona, 536 U. S. 584 (2002).

Blakely v. Washington, 542 U. S. 296 (2004).

U.S. Const. amend. VI.

Section 558.018.5(2), RSMo Cum. Supp. 1996.

[7] See Rule 84.04(d)(1)(C).

POINT II

The motion court erred in denying Appellant's claim that his constitutional rights to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution were violated on April 11, 2011 (and before the status hearing began) when the trial court denied his motion which claimed a procedural due process violation, as applied to him, under the extended term procedures of section 558.021.2 if the status hearing was held before the case was in a jury trial because the State was not proving prior convictions (Appellant had none) but was proceeding under 558.018.5(2).[8]

Consequently, on April 11, 2011 a status hearing was held despite the fact that Appellant's case was not in a jury trial and the law states that "[i]n a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of its hearing . . . ."[9] Section 558.021.2.

Appellant's case was set for a jury trial on April 26, 2011, and therefore, his constitutional rights to procedural due process were violated when the trial court held the status hearing on April 11, 2011 because his case was not in a jury trial on April 11, 2011, and the statute does not state "[i]n a jury trial, *or at any time prior to a jury trial*,

[8] See Rule 84.04(d)(1)(A).

[9] See Rule 84.04(d)(1)(B).

the facts shall be pleaded, established and found prior to submission to the jury outside of its hearing . . . ."[10] Section 558.021.2.

State v. Gilyard, 979 S.W.2d 138 (Mo. banc 1998).

Johnson v. State, 103 S.W.3d 182 (Mo. App. W.D. 2003).

State v. Rogers, 95 S.W.3d 181 (Mo. App. W.D. 2003).

U.S. Const. amend. XIV.

Section 558.021.2, RSMo Cum. Supp 1996.

[10] See Rule 84.04(d)(1)(C).

ARGUMENT

POINT I

The motion court erred in denying Appellant's claim that his constitutional rights to a jury trial under the Sixth Amendment of the United States Constitution and Article I, Section 18(a) of the Missouri Constitution were violated when the trial court, before accepting his guilty pleas, denied his motion which challenged the constitutionality of the predatory sexual offender statute when the State is not proving prior convictions, but proceeding under section 558.018.5(2).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. amend. VI. "That in criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county." Mo. Const. art. I, sec. 18(a).

A. STANDARD OF REVIEW

1. We review a denial of post-conviction relief to determine whether the motion court's findings and conclusions are clearly erroneous. Forrest v. State, 290 S.W.3d 704, 708 (Mo. banc 2009). Findings and conclusions are clearly erroneous if, upon review of the entire record, we are left with the definite and firm impression that a mistake has been made. Gehrke v. State, 280 S.W.3d 54, 56-57 (Mo. banc 2009).

2. However, "[t]he constitutional validity of a statute is a question of law to be reviewed de novo. State v. Biggs, 333 S.W.3d 472, 477 (Mo. banc 2011). "A statute is presumed constitutional and will be found unconstitutional only if it clearly contravenes a

specific constitutional provision." State v. Pribble, 285 S.W.3d 310, 313 (Mo. banc 2009). "The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations." Franklin County ex rel. Parks v. Franklin County Comm'n, 269 S.W.3d 26, 29 (Mo. banc 2008).

B. ARGUMENT

The Argument is broken down as follows:

1. Analysis of the motion court's Judgment denying relief;

2. Analysis of Apprendi and its progeny;

3. Analysis of the intersection of the statute of limitations and the State's charging options; and

4. Argument – "[h]ad the judge imposed [] the sentence solely on the basis of the plea, he would have been reversed." Blakely, 542 U.S. at 304.

1. The motion court's Judgment denying relief seems clearly erroneous because of Apprendi and its progeny.[11]

The motion court denied relief on this point based upon finding that a) State v. Gilyard, 979 S.W.2d 138 (Mo. banc 1998) applied and b) by pleading guilty Appellant waived the issue. (L.F. 19-20).

[11] To the extent the Judgment references an evidentiary hearing, it should be noted that Appellant never requested an evidentiary hearing because the issues present questions of law and the only facts necessary would be certain procedural facts.

a. The motion court's finding that State v. Gilyard applied seems clearly erroneous because of Apprendi and its progeny.

Appellant's motion (i.e., Defendant's Constitutional Challenge to Section 558.018.5(2)) is replete with citations to Apprendi v. New Jersey, 530 U. S. 466 (2000); Ring v. Arizona, 536 U. S. 584 (2002); and Blakely v. Washington, 542 U. S. 296 (2004). (L.F. 65-71). As mentioned in the Jurisdictional Statement on pp. 10-11 supra, State v. Gilyard, 979 S.W.2d 138 (Mo. banc 1998) was decided before Apprendi. Again, that Court discussed the claims of due process and equal protection in the context of a jury trial, but the opinion is silent as to whether a Sixth Amendment jury trial claim was actually presented to the trial court. Regardless, in light of Apprendi and its progeny, a defendant's Sixth Amendment right to a jury trial in the context of the predatory sexual offender statute (i.e., section 558.018.5(2)) has never been addressed, and thus, the finding that State v. Gilyard, 979 S.W.2d 138 (Mo. banc 1998) applied seems clearly erroneous.

b. The motion court's finding that Appellant waived the issue by pleading guilty seems clearly erroneous because of the case law.[12]

The Jurisdictional Statement amply establishes that Appellant did not waive the issue by pleading guilty. "Constitutional violations are waived if not raised at the earliest possible opportunity." State ex rel. York v. Daugherty, 969 S.W.2d 223, 224 (Mo. banc

[12] With all due respect, the motion court provided no legal reason for its finding in this regard. (L.F. 20).

1998). Failing to challenge the constitutional validity of a statute before pleading guilty is fatal to a Rule 24.035 motion. Ross v. State, 335 S.W.3d 479, 479 (Mo. banc 2011); see also Feldhaus v. State, 311 S.W.3d 802, 805 (Mo. banc 2010) (holding that because the constitutional issue "was not raised at the earliest opportunity and prior to his plea of guilty, it was waived."). Since Appellant was eventually charged as a predatory sex offender, "[t]he earliest opportunity for the appellant to have raised his constitutional challenge to § 558.018 would have been during the predatory sexual offender status hearing." State v. Rogers, 95 S.W.3d 181, 185 (Mo. App. W.D. 2003); (L.F. 57; 78-79).

On April 11, 2011, a status hearing was held. (L.F. 24). Appellant presented his motion challenging the constitutionality of section 558.018.5(2) under the Sixth Amendment's jury trial guarantee to the trial court on April 11, 2011 and before the status hearing. (L.F. 24; 65). The trial court took the motion under advisement. (L.F. 77).

On April 22, 2011, the trial court denied Appellant's constitutional challenge to section 558.018.5(2) and denied it before Appellant plead guilty on April 22, 2011. (L.F. 24-25; 80). Appellant then presented his claim – that his constitutional rights to a jury trial under the Sixth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution were violated when the trial court denied his motion challenging the constitutionality of section 558.018.5(2) – to the trial court in his motion pursuant to Rule 24.035 on October 20, 2011. (L.F. 7). Therefore, the finding that Appellant's guilty plea waived the issue seems clearly erroneous.

2. Apprendi and its progeny

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). And Apprendi applies to cases where a defendant pleads guilty. Blakely v. Washington, 542 U.S. 296 (2004).

> [Apprendi's] rule reflects two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason[.]'

Blakely v. Washington, 542 U.S. 296, 301-302 (2004) (internal citations omitted).

"[T]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely v. Washington, 542 U.S. 296, 303 (2004). "Thus, while judges may exercise discretion in sentencing, they may not 'inflic[t] punishment that the jury's verdict alone does not allow.'" S. Union Co. v. United States, 132 S. Ct. 2344, 2350 (2012) (quoting Blakely, 542 U.S. at 304).

"Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." Blakely, 542 U.S. at 305-306. Specifically, "the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." Id. at 308.

Analogizing to one of Oliver W. Holmes' lectures, the Apprendi Court stated,

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently.

Apprendi, 530 U.S. at 476.

Apprendi and Blakely "are rooted in the historic jury function—determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." Oregon v. Ice, 555 U. S. 160, 163 (2009). "Apprendi's 'core concern' is to

reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.'" S. Union Co. v. United States, 132 S. Ct. 2344, 2350 (2012) (quoting Ice, 555 U.S. at 170). "As Apprendi held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Blakely, 542 U.S. at 313.

Further, "Apprendi guards against[] judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow." S. Union Co. v. United States, 132 S. Ct. 2344, 2352 (2012). "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in Apprendi), one of several specified facts (as in Ring), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence." Blakely v. Washington, 542 U.S. 296, 305 (2004).

"[T]he authority of States over the administration of their criminal justice systems lies at the core of their sovereign status." Oregon v. Ice, 555 U. S. 160, 170 (2009). However, Blakely cautioned that "broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions." Cunningham v. California, 549 U.S. 270, 290 (2007).

"Ring and Apprendi merely held that facts that are the functional equivalent of elements of offenses, such as a statutory aggravating circumstance that is required for eligibility for the death penalty, must be found beyond a reasonable doubt by a jury." State v. Jaco, 156 S.W.3d 775, 780 (Mo. banc 2005). However, even if the "sentencing

factor" at issue clearly appears to be of an elemental nature as was the case in Apprendi, "the relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi v. New Jersey, 530 U.S. 466, 494 (2000); see also Ring v. Arizona, 536 U.S. 584, 602 (2002).

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 602 (2002). "[E]ven if the State characterizes the additional findings made by the judge as 'sentencing factors,' Apprendi's prescription governs. Ring v. Arizona, 536 U.S. 584, 589 (2002) (citing Apprendi, 530 U.S. at 492). Because "[b]y its very terms, this statute mandates an examination of the defendant's state of mind -- a concept known well to the criminal law as the defendant's mens rea." Apprendi v. New Jersey, 530 U.S. at 492. And "[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" Apprendi, 530 U.S.at 493.

Further, "a State cannot through mere characterization change the nature of the conduct actually targeted. It is as clear as day that this hate crime law defines a particular kind of prohibited intent, and a particular intent is more often than not the sine qua non of a violation of a criminal law." Apprendi, 530 U.S. at 493 n.18. Similarly, "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater

than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." Apprendi v. New Jersey, 530 U. S. at 483 n.10.

3. The intersection of the statute of limitations and the State's charging options

On August 6, 2010, the State filed a felony Complaint. (L.F. 46). The Complaint charged three counts: one count of sodomy and two counts of statutory sodomy in the first degree. (L.F. 46). Count I alleged that between May 18, 1988 and October 15, 1988 Appellant knowingly had deviate sexual intercourse with S.D. (DOB: 10-16-74). (L.F. 46). The mere fact that the State filed the Complaint raises a reasonable inference that the State's intent was to prosecute and thus he would have been entitled to a jury trial. State v. Brown, 660 S.W.2d 694, 699 (Mo. banc 1983) (indicating that intent is usually inferred from the circumstances).

On August 30, 2010, undersigned counsel filed his entry of appearance. (L.F. 48) On October 14, 2010, Appellant filed a Motion to Dismiss Count I claiming that Count I was not properly filed based on the applicable statute of limitations, i.e., section 556.037, RSMo.[13] (L.F. 49). On November 29, 2010, the State filed an Amended Complaint and this charging document did not contain Count I of the initial Complaint – S.D. with DOB 10-16-74 was no longer an alleged victim. (L.F. 46; 53). Consequently, Appellant could

[13] The four versions of section 556.037, RSMo are in Defendant's Appendix at pp. A10-A13.

not obtain a ruling on his Motion to Dismiss Count I because as a matter of prosecutorial discretion the issue was no longer before the court.[14] (L.F. 39).

At this stage of the proceedings, under the law a conviction-free defendant, if found guilty by jury trial or plea, would be looking at either probation or prison. Section 566.062.

On December 7, 2010, the State filed an Amended Information. (L.F. 57). The Amended Information alleged that Appellant was a predatory sexual offender under Section 558.018, RSMo. (L.F. 57). The basis that Appellant was a predatory sexual offender was the alleged victim from Count I of the initial Complaint (S.D. with DOB 10-16-74) – the very same alleged victim who was removed from the Amended Complaint.

At this stage of the proceedings, if a conviction-free defendant is found to be a predatory sexual offender, he would know that if he either pleads guilty or is found guilty by a jury, he will be facing a guaranteed life imprisonment sentence with eligibility for parole. Sections 558.018.4 and 558.018.6. If such a defendant decided to have a jury trial and lost, jury sentencing would only be relevant to the statutorily mandated minimum amount of time to be served before parole.

In brief, there seems to be three available options regarding the State's charging decision relative to the statute of limitations. Section 556.037. One, assuming the statute

[14] The complete argument as to why the Count was barred by the statute of limitations can be found beginning at L.F. 49 – Motion to Dismiss Count I.

of limitations bars prosecution, the State can only attempt to use section 558.018.5(2). (L.F. 70 – indicating the General Assembly's intent in this area of the law must be to help "victims" with repressed memory). Two, assuming the statute of limitations does not bar prosecution, the State can file a charge and, if a defendant is acquitted, the State can again attempt to use section 558.018.5(2). Three, assuming the statute of limitations does not bar prosecution, the State can exercise its discretion and not file a charge, but instead attempt to use section 558.018.5(2).[15]

In the context of section 558.018.5(2), it is extremely difficult to reconcile this particular statute of limitations with the Sixth Amendment's jury trial guarantee. The

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[15] This last option, which is not before the Court, raises another constitutional issue which also underscores the underlying problem(s) with this particular subsection of the statute and the Sixth Amendment's jury trial guarantee – if the motion court's Judgment denying relief is allowed to stand. Specifically, it would appear that the State can file a case and use information not barred by the statute of limitations as the alleged basis for predatory sexual offender, have a status hearing anytime before a jury is empanelled (see Argument in Point II infra at C.1), and should a judge not find that defendant was a predatory sexual offender, the State can dismiss, refile, and bypass the Fifth Amendment's Double Jeopardy Clause and take it to a jury or, perhaps, use it in plea bargaining. Therefore, the status hearing is the functional equivalent of a bench trial because all of the basics are present including: finding beyond a reasonable doubt, confrontation, cross-examination, and the presentation of evidence.

statute of limitations has been increased to have a long-arm reach of forty-eight years ("commenced within thirty years after the victim reaches the age of eighteen"), but if an act does not fall within the statute of limitations, as with Appellant's case, it nonetheless can bypass the Sixth Amendment's jury trial guarantee and be used to obtain a guaranteed sentence of life imprisonment with eligibility for parole. Section 556.037, RSMo 2011. This seems patently and fundamentally unfair. Lisenba v. California, 314 U.S. 219, 236 (1941) (stating "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.").

Therefore, the Sixth Amendment's jury trial guarantee would seem to become highly relevant if not the single determining factor when the State is attempting to proceed under section 558.018.5(2) with an otherwise valid charge but for the statute of limitations.

4. In light of Apprendi and its progeny, Appellant's Sixth Amendment right to a jury trial seems to have been violated because "[h]ad the judge imposed [] the sentence solely on the basis of the plea, he would have been reversed." Blakely, 542 U.S. at 304.

Again, Appellant plead guilty to three counts of statutory sodomy in the first degree after the trial court found Appellant to be a predatory sexual offender in a hearing that took place well before his then scheduled jury trial date. (L.F. 24-25; 81). The trial court was statutorily required to sentence Appellant to the extended term of life imprisonment with eligibility for parole *even though* the trial court, solely on the basis of Appellant's guilty plea, could only impose a suspended imposition of sentence, a

suspended execution of sentence, or a prison sentence and, should the trial court have chosen prison sentence, the trial court could not also set the minimum time required to be served before being eligible for parole, and therefore, Appellant's Sixth Amendment rights to a jury trial were violated because the finding under section 558.018.5(2) should be made by a jury in order to preserve "the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." Oregon v. Ice, 555 U.S. 160, 168 (2009). In other words, it is impossible for the trial court to have set the minimum time required to be served before being eligible parole had Appellant plead guilty to the counts without being charged as a predatory sexual offender. Blakely, 542 U.S. at 304 ("solely on the basis of the plea"). Again, the trial court's sentencing options would have been to impose a suspended imposition of sentence, a suspended execution of sentence, or a prison sentence.

Also, to the extent the "sentencing factor" at issue clearly appears to be of an elemental nature as was the case in Apprendi, "the relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi v. New Jersey, 530 U.S. 466, 494 (2000); see also Ring v. Arizona, 536 U.S. 584, 602 (2002). Thus, to the extent Blakely's and Apprendi's holdings are based on the fact that the additional findings made – a purpose to intimidate (as in Apprendi) or with deliberate cruelty (as in Blakely) – are the functional equivalent of elements of the underlying offenses, such facts would not seem to be controlling as to Appellant's case.

In 1996, our General Assembly took what has historically been reserved for the jury and, under section 558.018.5(2), has instead turned it into a sentencing factor/aggravating circumstance as evidenced by the language "whether or not the act resulted in a conviction." Section 558.018.5(2); (L.F. 70). "[E]ven if the State characterizes the additional findings made by the judge as 'sentencing factors,' Apprendi's prescription governs. Ring v. Arizona, 536 U.S. 584, 589 (2002) (citing Apprendi, 530 U.S. at 492).

Analogizing to Apprendi's analogizing to Holmes, Missouri threatened Appellant with certain pains if he committed statutory sodomy in the first degree and with additional pains if the court found him to be a predatory sexual offender based on the commission of an act regardless of whether or not that act resulted in a conviction. Apprendi, 530 U.S. at 476. And "[a]s a matter of simple justice, it seems obvious that the procedural safeguards designed to protect [Appellant] from unwarranted pains should apply equally to the two acts that [Missouri] has singled out for punishment." Id. at 476-477.

ARGUMENT

POINT II

The motion court erred in denying Appellant's claim that his constitutional rights to procedural due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution were violated on April 11, 2011 (and before the status hearing began) when the trial court denied his motion which claimed a procedural due process violation, as applied to him, under the extended term procedures of section 558.021.2, RSMo if the status hearing was held before the case was in a jury trial because the State was not proving prior convictions (Appellant had none) but was proceeding under 558.018.5(2).

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV. "That no person shall be deprived of life, liberty or property without due process of law." Mo. Const. art. I, sec. 10. "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results." Snyder v. Massachusetts, 291 U.S. 97, 116 (1934). "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236 (1941).

A. STANDARD OF REVIEW

1. We review a denial of post-conviction relief to determine whether the motion court's findings and conclusions are clearly erroneous. Forrest v. State, 290 S.W.3d 704, 708 (Mo. banc 2009). Findings and conclusions are clearly erroneous if, upon review of

the entire record, we are left with the definite and firm impression that a mistake has been made. Gehrke v. State, 280 S.W.3d 54, 56-57 (Mo. banc 2009).

2. However, "[t]he constitutional validity of a statute is a question of law to be reviewed de novo. State v. Biggs, 333 S.W.3d 472, 477 (Mo. banc 2011). "A statute is presumed constitutional and will be found unconstitutional only if it clearly contravenes a specific constitutional provision." State v. Pribble, 285 S.W.3d 310, 313 (Mo. banc 2009). "The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations." Franklin County ex rel. Parks v. Franklin County Comm'n, 269 S.W.3d 26, 29 (Mo. banc 2008).

B. ANALYSIS

"The primary rule of statutory construction requires this Court to ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute." Jones v. Director of Revenue, 832 S.W.2d 516, 517 (Mo. banc 1992) (citing Union Elec. Co. v. Director of Revenue, 799 S.W.2d 78, 79 (Mo. banc 1990)). "Where language of a statute is clear and unambiguous there is no room for construction." Community Federal Sav. & Loan Asso. v. Director of Revenue, 752 S.W.2d 794, 798 (Mo. banc 1988) (citing Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397 (Mo. banc 1986)). "A court may not add words by implication to a statute that is clear and unambiguous." Asbury v. Lombardi, 846 S.W.2d 196, 202 n.9 (Mo. banc 1993). And "a statute should not be construed to lead to an absurd result." State ex rel. Zoological Park Subdistrict v. Jordan, 521 S.W.2d 369, 372 (Mo. 1975).

C. ARGUMENT

The motion court denied relief on this point based upon finding that 1) section 558.021.2 does not require that the facts be presented and that a finding be made "on the same day that a jury is empanelled" and 2) by pleading guilty Appellant waived the issue. (L.F. 20-21).

1. The motion court's finding regarding section 558.021.2 seems clearly erroneous because the statute is clear and unambiguous.

Appellant's motion (i.e., Defendant's Procedural Due Process Objection to Section 558.021.2) demonstrates the procedural concern with holding a status hearing on April 11, 2011 when the jury trial date was set for April 26, 2011. (L.F. 63-64). On April 11, 2011, Appellant's case was not in a jury trial. (L.F. 24). Section 558.021.2 does not state (and should not be interpreted to mean that) "[i]n a jury trial, *or at any time prior to a jury trial*, the facts shall be pleaded, established and found prior to submission to the jury outside of its hearing. . . ." Section 558.021.2. Thus, the status hearing cannot be held be one day, one month, or one year before the jury is actually empanelled.

In addition, section 558.021.2 is clear and unambiguous. Community Federal Sav. & Loan Asso. v. Director of Revenue, 752 S.W.2d 794, 798 (Mo. banc 1988). Consequently, "there is no room for [statutory] construction." Id. Thus, when the State is proceeding under section 558.018.5(2), to construe the statute in such a manner that the predatory sexual offender finding is not required to be made on the same day that a jury is empanelled leads to an absurd result because it eviscerates Appellant's Sixth Amendment right to a jury trial. See State ex rel. Zoological Park Subdistrict v. Jordan,

521 S.W.2d 369, 372 (Mo. 1975) (stating that "a statute should not be construed to lead to an absurd result."). This finding also seems at odds with current practice as illustrated in State v. Gilyard and State v. Rogers infra.

Similarly, to the extent that the motion court's Judgment denying relief refers to section 558.021.3, that section does not state "[i]n a trial without a jury or upon a plea of guilty, *or at any time prior to a plea of guilty*, the court may defer the proof and findings . . ." Section 558.021.3; (L.F. 20). The triggering event for section 558.021.3, and particularly important when the State is not merely proving prior convictions, is either a trial without a jury or a guilty plea…and neither event had occurred on April 11, 2011. (L.F. 24). Moreover, not only had defendant not plead guilty on April 11, 2011, there is no evidence or record of his ever having expressed any intent to plead guilty.

Even in State v. Gilyard, the case that predates Apprendi but which did involve a finding of predatory sexual offender, no information regarding predatory sexual offender was presented before the case was in a jury trial. State v. Gilyard, 979 S.W.2d 138, 140 (Mo. banc 1998) ("At trial, after presenting the above evidence regarding J.D., the state called S.W., a nineteen-year-old female, as a witness."); and Id. at 142 ("Because the state did not introduce evidence of any prior convictions of Gilyard, the trial court must have relied on S.W.'s testimony regarding Gilyard's assault on October 16, 1996.").

And in State v. Rogers, the predatory sexual offender hearing was also not held until the case was in a jury trial. State v. Rogers, 95 S.W.3d 181, 184 (Mo. App. W.D. 2003) (indicating that the "hearing was subsequently held during a recess in the State's case-in-chief.").

In addition, in terms of guilty pleas involving predatory sexual offender and section 558.021.3, and when the State was attempting to proceed under section 558.018.5(2), there is persuasive authority that there must be a guilty plea before proceeding to make any additional findings. Johnson v. State, 103 S.W.3d 182, 185 (Mo. App. W.D. 2003) ("In March 1998, the trial court held a plea hearing. At the hearing, Mr. Johnson waived proof of facts as to the two Kansas forcible sodomies."). This would also seem to be consistent with a reasonable interpretation of section 558.021.3.

Therefore, the motion court's finding that section 558.021.2 does not require that the facts and finding be made on the same day that a jury is empanelled seems clearly erroneous because it is either construing a statute when there is "no room for construction" or adding words by implication to reach this finding. Community Federal Sav. & Loan Asso. v. Director of Revenue, 752 S.W.2d 794, 798 (Mo. banc 1988) and Asbury v. Lombardi, 846 S.W.2d 196, 202 n.9 (Mo. banc 1993) ("A court may not add words by implication to a statute that is clear and unambiguous.").

2. The motion court's finding that Appellant waived the issue by pleading guilty seems clearly erroneous because of the case law.[16]

Again, the Jurisdictional Statement amply establishes that Appellant did not waive the issue by pleading guilty. "Constitutional violations are waived if not raised at the earliest possible opportunity." State ex rel. York v. Daugherty, 969 S.W.2d 223, 224

[16] Again, with all due respect, the motion court provided no legal reason for its finding in this regard. (L.F. 21).

(Mo. banc 1998). Failing to challenge the constitutional validity of a statute before pleading guilty is fatal to a Rule 24.035 motion. Ross v. State, 335 S.W.3d 479, 479 (Mo. banc 2011); see also Feldhaus v. State, 311 S.W.3d 802, 805 (Mo. banc 2010) (holding that because the constitutional issue "was not raised at the earliest opportunity and prior to his plea of guilty, it was waived."). Since Appellant was eventually charged as a predatory sex offender, "[t]he earliest opportunity for the appellant to have raised his constitutional challenge to § 558.018 would have been during the predatory sexual offender status hearing." State v. Rogers, 95 S.W.3d 181, 185 (Mo. App. W.D. 2003); (L.F. 57; 78-79).

On April 11, 2011, a status hearing was held. (L.F. 24). Upon receiving the State's notice regarding a status hearing, Appellant filed a motion objecting to the State's request to hold a status hearing prior to there being any finding of guilt. (L.F. 59; 60). Said motion specifically claimed that Appellant's constitutional rights to procedural due process would be violated if the status hearing is held prior to there being any finding of guilt. (L.F. 60). On April 5, 2011, the trial court denied the motion. (L.F. 62).

Appellant presented his motion claiming a procedural due process violation under section 558.021.2, to the trial court on April 11, 2011 and before the status hearing. (L.F. 24; 63). The trial court denied Appellant's motion claiming a procedural due process violation section 558.021.2, RSMo on April 11, 2011 and before the status hearing. (L.F. 24; 76).

Appellant then presented his claim – that there was a procedural due process violation under the Fourteenth Amendment to the United States Constitution and Article

I, Section 10 of the Missouri Constitution under section 558.021.2 when the State was not proving prior convictions but was proceeding under 558.018.5(2) and the status hearing was held on April 11, 2011 before the case was in a jury trial – to the trial court again in his motion pursuant to Rule 24.035 on October 20, 2011. (L.F. 7). Therefore, the finding that Appellant's guilty plea waived the issue seems clearly erroneous.

CONCLUSION AND RELIEF SOUGHT

Assuming arguendo that section 558.021 was not on the books, we submit that Appellant's Sixth Amendment right to a jury trial under section 558.018.5(2) was violated because the trial court could not have imposed the sentence it did "solely on the basis of the plea." Blakely, 542 U.S. at 304.

Then, when one considers section 558.021 in the context of Appellant's case – when the State was proceeding under section 558.018.5(2) (i.e., the State was not proving prior convictions as Appellant had none) and the status hearing was held before the case was in a jury trial – we submit that Appellant's Sixth Amendment right to a jury was thereby circumvented by the State and, thus, rendered meaningless – contrary to the clear intent and wording of both the Missouri Constitution and the Constitution of the United States of America.

Coming full circle, assuming that the status hearing was held in a jury trial and outside the presence of the jury, we further submit that Appellant's right to a jury was still violated because the trial court could not have imposed the sentence it did. Blakely, 542 U.S. at 303 (stating "that the 'statutory maximum' for Apprendi purposes is the

maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.").

Therfore, Appellant seeks to have his sentence vacated, his pleas of not guilty reinstated, to be returned to the position he was in on April 11, 2011, to have section 558.018.5(2) declared unconstitutional under the Sixth Amendment's jury trial guarantee, and to have a finding that his procedural due process rights were violated with respect to section 558.021.2.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and excluding the cover, certificate of service, and appendix, the attached brief contains 9,251 words as determined by Microsoft Word 2007 software. I further certify on this 21st day of August, 2012, a copy of this brief was electronically served via the Missouri eFiling System to Mr. Shaun Mackelprang, Assistant Attorney General with the Office of the Attorney General and a registered user of the Missouri eFiling system.

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No. SC92553

In The
Supreme Court of Missouri

CHARLES R. GARRIS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Warren County Circuit Court
Twelfth Judicial Circuit
The Honorable Keith Sutherland, Circuit Judge

APPELLANT'S APPENDIX

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APPENDIX'S TABLE OF CONTENTS